UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ALEC S. COSTERUS, *Plaintiff* v. BARRY NEAL, *et al.* *Defendants*	Docket No.: 00 CV 12156 MEL

MEMORANDUM IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. BACKGROUND

Defendants Barry Neal, Timothy Landers, Peter Holman, John Kennedy, Leonard J. Wetherbee, and the Town of Concord (collectively, the "Concord Defendants") have moved for entry of summary judgment as to all claims against them. Plaintiff Alec S. Costerus so opposes. In addition, where there is no genuine issue as to a material fact, Plaintiff also moves for entry of summary judgment in his favor. This memorandum is submitted in support of Plaintiff's opposition to the Concord Defendants' motion for summary judgment and in support of Plaintiff's own motion for summary judgment.

To support of their motion, the Concord Defendants submitted a memorandum in support of their motion for summary judgment alleging that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law. First, to the extent that there are no genuine issues of material fact, these facts not only support Plaintiff's opposition to the Concord

Defendants' motion, but are in fact supportive of Plaintiff's Motion for Summary Judgment. As a result, the Concord Defendants are not entitled to judgment and Plaintiff is entitled to entry of summary judgment in his favor as a matter of law.

The Concord Defendants allege that the Plaintiff's complaint alleges a "hodgepodge of claims." The allegations presented by the plaintiff represent serious constitutional and statutory violations, to which, that as a matter of law, conscience, and principal, Plaintiff is entitled to justice. While the Amended Complaint alleged forty-six (46) counts, contrary to the Concord Defendants assertion, not all of them were asserted against these defendants[1]. In fact, of the thirty (30) counts originally levied against the Concord Defendants, eighteen (18) counts remain against the Concord Defendants. Largely, the Concord Defendants' present motion seeks to rehash its previously failed attempt in this Court to have the remaining counts dismissed. Plaintiff opposes the entry of summary judgment as to all claims brought against the Concord Defendants.

II. ARGUMENT IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A. Standard for Summary Judgment

The defendants' description of the standard for summary judgment is academically pure, if not detrimental to their case. The plaintiff has more than a "scintilla" of evidence on which he could persuade a jury to reasonably find in his favor. Moreover, now that the Concord Defendants have moved to aver an absence of evidence to support the plaintiff's claims, the plaintiff must be given the opportunity to present evidence significantly probative of and substantial to establish the existence of an issue of fact that is both "genuine" and "material."[2]

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[1] The other defendants were dismissed through separate motions for dismissal.

Defendants argue that they need to only show that there is an absence of evidence to support the non-moving party's case. It is an undisputed fact that the Concord Defendants did not possess a search warrant.[3] This presence of evidence supports the Plaintiff's factual allegations. Accordingly, the defendants' argument fails to meet the very standard that they mustered.

B. Fourth Amendment and MCRA Claims of Illegal Search and Seizure

1. § 1983 Claims Generally[4]
(Counts I, II, V, VI, and XI)

The Concord Defendants argue that in order to prevail on a § 1983 claim, "a plaintiff must show that he or she was deprived of the right, privilege or immunity secured by the Constitution or laws of the United States by a person acting under the color of state law." The Concord Defendants rely on the First Circuit which held that a civil rights claim is "fatally lacking" if it fails to allege "with at least some degree of particularity" the overt acts which are claimed to give rise to the cause of action. Ironically, the defendants note that "mere conclusory allegations have been insufficient to withstand a motion to dismiss in the absence of specific factual allegations detailing what actions are complaint of."[5]

First, this very argument has already been asserted by the Concord Defendants in their previously failed motion to dismiss. In its Memorandum and Order, this Court dismissed

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2 *Sheinkopf v. Stone*, 927 F.2d 1259, 1261, 1262 (1st Cir. 1991); See also *Feliciano v. State of Rhode Island*, 160 F.3d at 25 (1st Cir. 1997).

3 See transcripts of Deposition of Barry Neal, p. 26, line 17; transcript of Deposition of Timothy Landers, p. 24, lines 14-22 and p. 26, line 17; transcript of Deposition of Peter Holman, p. 18, line 1.

4 Though not mentioned specifically here, the Concord Defendants could equally make the same argument as it relates to the Massachusetts Civil Rights Act, M.G.L. c. 12,§ 11I. Plaintiff's discussion herein applies equally as the defendants rely on MCRA.

5 Defendants' Memorandum in Support of Motion for Summary Judgment, p.4, and cases cited therein.

Counts I through VIII and Counts XI through XV as they make claims against Defendant Town of Concord as the complaint failed to adequately allege a policy or custom of the Town. The Court noted that "The defendants' motion is otherwise denied."[6] Thus, by its very decision to not dismiss the § 1983 and its state-related Massachusetts Civil Rights Act claims, this Court has already ruled on the sufficiency of the degree of particularity of the facts alleged to withstand a motion to dismiss.

Second, while the defendants' argument is academically accurate, the argument is wholly irrelevant to the instant matter. Contrary to the defendants' assertions, the specific factual allegations are set forth in great detail in the Amended Complaint.[7]

Third, the Plaintiff's undisputed evidence supports his § 1983 and MCRA claims that he was deprived by the Concord Defendants of his Constitutional Fourth Amendment protections and his Article XIV protections of the Massachusetts Declaration of Rights against unreasonable searches. There is no controversy that the Concord Defendants conducted a warrantless search and seizure as this is an undisputed material fact. The only genuine issue regarding this fact is the defendants' affirmative defense of consent and the existence of exigent circumstances. And assuming, *arguendo*, that such a unwarranted search and seizure did occur, the defendants argue that the individual Concord Defendants enjoy qualified immunity. Nonetheless, the Plaintiff clearly showed that he was deprived of the right, privilege or immunity secured by the Constitution or laws of the United States and Massachusetts' state-equivalent by the Concord Defendants acting under the color of state law. The defendants' assertion of an affirmative defense is an issue for trial and is not ripe for a motion for summary

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6 Memorandum and Order, Docket Entry 63, November 27, 2001, Lasker, J.

7 The specific factual allegations regarding the § 1983 Claims are in the Amended Complaint, Statement of Facts, ¶¶ 23-68, pp. 11-20; and in Counts I, II, pp. 23-30, and Counts V, and VI, pp. 33-36.

judgment. Accordingly, this Court should deny the defendants' motion.

2. Officer Landers Did Not Have Consent to Conduct an Unwarranted Search and Seizure

The Concord Defendants make the legal argument that Mrs. Costerus had authority to give consent to search the residence. This matter of law is immaterial to the instant matter. The genuine issue of material fact lies in whether Mrs. Costerus gave consent or whether she merely acquiesced to the authority posed by the Concord Defendants.

Defendant Landers' oral deposition testimony shows that Defendant Neal instructed Defendant Landers to "retrieve"[8] and to "[t]ake the Guns."[9] Elaborating clearly, Defendant Neal instructed Defendant Landers to "locate and seize firearms"[10] and to "bring them to the station."[11] Defendant Landers further testified that "[m]y Sergeant said that . . . the weapons are to be brought to the station."[12] Thus, the goal of the search and seizure was clearly established *before* Mrs. Costerus could have given any consent, which consent was neither sought nor provided. Defendant Landers was following orders and was determined to obey his superior officer, Defendant Neal. Mrs. Costerus' acquiescence to the show of authority[13] does not rise to the level of any voluntary or willing consent. In any event, this premature affirmative defense by the defendants is a genuine issue of material fact to be decided at trial, and is certainly not one that should be submitted in a motion for summary judgment. Accordingly, the defendants' motion should be denied.

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8 Deposition of Barry Neal, p. 28, line 13.

9 Deposition of Timothy Landers, p. 20, lines 14.

10 Deposition of Timothy Landers, p. 20, lines 14-22.

11 Deposition of Timothy Landers, p. 21, lines 12-14.

12 Deposition of Timothy Landers, p. 27, lines 3-4 and lines 19-24.

13 Defendant Landers was in full uniform consisting of, among other equipment, a badge, duty belt, firearm, handcuffs. Deposition of Timothy Landers, p. 46, lines 11-23.

3. Exigent Circumstances Did Not Exist

The Concord Defendants argue that Defendant Landers was justified in removing the weapons from the plaintiff's home following a domestic disturbance involving an assault and battery. The defendants further argue that "[G]iven the potential volatile nature present at the Costerus residence and the disclosure of past domestic violence incidents involving the couple, there existed exigent circumstances to remove loaded and unsecured weapons from the plaintiff's residence."[14]

Exigent circumstances have been variously defined as a "specially pressing or urgent law enforcement need"[15] and a "compelling need for official action and no time to secure search warrant."[16] Exigent circumstances have also been defined as an imminent and substantial threat to life, health, or property.

Courts routinely say that exigent circumstances exist only if the threat is imminent. An imminent threat means a situation in which officers reasonably believed the harm that would occur if they delayed taking action until a search warrant could be issued. It is not sufficient that a reasonable officer believed a condition exists which could *sometime* seriously injure persons or property. Rather, the reasonable officer would have to believe the injury is likely to occur or before he could obtain a search warrant.

The oral deposition testimonies of Defendants Landers and Neal shows that exigent circumstances were neither present nor even considered. Defendant Landers followed the instructions of his supervisor:

> Sergeant Neal, told me that the guns were to be brought to the

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[14] Defendant's Memorandum in Support of Motion for Summary Judgment, p. 8.

[15] *Illinois v. McArthur,* 531 U.S. ___ [148 L.Ed.2d 838, 847] (2001).

[16] *Michigan v. Tyler,* 436 U.S. 499, 509 (1978).

> station. He's my supervisor. I do what he tells me. He, I would think, would have the facts that would warrant that I take those weapons and that is what was done.[17]

In response to specific questions posed during depositions, Defendant Landers further confirmed that he was just following orders.[18]

When asked to described the exigent circumstances that were purported to exist, Defendant Landers said "[m]y supervisor told me to locate them and when they were located they were loaded."[19] However, exigent circumstances must exist *before* a warrantless entry or search is conducted. The tainted fruits of a search cannot establish prior exigency. There must be specific facts, not unparticularized suspicions or hunches, that reasonably indicated an immediate warrantless entry or search was necessary. Defendant Landers' testimony clearly shows that he was merely following orders. Even though Defendant Landers was commanded by a superior officer to do something, this is insufficient to establish exigent circumstances as a matter of law.

Defendant Neal's elaboration of the exigent circumstances was equally telling. Responding to the question during his oral deposition, Defendant Neal said "Domestic violence . . . we felt we needed to take those guns to make sure that no one got hurt and we thought we had a right to do that."[20] Having a right to do something cannot possibly establish exigency.

A review of the facts shows a distinct absence of exigent circumstances. Both Defendants Landers[21] and Neal[22] testified that Mr. Costerus was safely in police custody at the

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17 Deposition of Timothy Landers, p. 27, lines 19-24.

18 Deposition of Timothy Landers, p. 29, lines 4-7 and p. 30, lines 2-3.

19 Deposition of Timothy Landers, p. 43, lines 10-11.

20 Deposition of Barry Neal, p. 26, line 23 through p. 27, line 2.

21 Deposition of Timothy Landers, p. 13, line 21, through p. 14, line 9; p. 18, line 24 through p. 19, line 3; p. 24, line 24 through p. 25, line 3; p. 50, lines 5-16.

22 Deposition of Barry Neal, p. 27, lines 3-10; p. 39-line 24 through p. 40, line 16.

Concord Police Station when Defendant Neal ordered Defendant Landers to search for, locate, confiscate, and bring Mr. Costerus' firearms to the station. Exigent circumstances requires imminence; the element of urgency is an indispensable ingredient for any emergency. In the instant matter, the Concord Defendants must establish that because of the urgency of the situation, a warrant could not be obtained in time. In fact, twenty-four hours passed,[23] giving ample time and opportunity for the Concord Defendants to seek and obtain a search warrant before Mr. Costerus could have made bail. The defendants have failed to show any pressing law enforcement need, no urgency, and have shown no imminent danger or threat posed by the firearms presence inside the residence. Further, the Concord Defendants cannot produce one shred of evidence that Mr. Costerus used or threatened to use those firearms against his wife.

The existence – or absence – of exigent circumstances is a matter of fact, the definition of which is a matter of law. While the law may be clear, the facts of the case cannot, however remotely, support the Concord Defendants' motion for summary judgment and support the Plaintiff's motion for summary judgment on Counts I, II, V, VI, VII, and X.

4. False Arrest and Malicious Prosecution Claims under State and Federal Statutes

a) Probable Cause Did Not Exist

The Concord Defendants make an unintelligible diatribe asserting that the existence of probable cause negated the false arrest; only one paragraph[24] pertained to the instant matter and was of any relevance. First, Mrs. Costerus did not report that she was grabbed and pushed as

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[23] Defendant Neal arrested Mr. Costerus around 4:00 PM and was still in police custody in a cell until, at a minimum, 6:30 PM. See Deposition of Barry Neal, p. 29, lines 9-11 and p. 48, line 15.

In the station, Mr. Costerus was originally held *without* bail (accordingly, there would be *no* possibility of making bail), and was only able to post $1,000 after the arraignment and bail hearings on the following day, nearly twenty-four (24) hours after Defendant Neal placed him under arrest. See Deposition of Barry Neal, p. 47, line 16 through p. 48, line 3.

[24] Defendants' Memorandum in Support of Motion for Summary Judgment, p. 13.

Defendant Neal reported. Mrs. Costerus reported only that Mr. Costerus touched her on the wrist which does not necessarily rise to the level of domestic assault and battery as the defendants alleged. A domestic assault and battery must, to some level, rise above mere marital touching.

Second, it was Mr. Costerus who initially sought out the police. Mr. Costerus indicated that there had been no physical contact between them. This was confirmed by the Concord Defendants' interview of Mr. Costerus' step-daughter.

Third, neither Mr. nor Mrs. Costerus signed the M.G.L. c. 209A rights form nor did either of them – at any time – seek a restraining order of any kind.

Fourth, the factual question is one of the "reasonable" officer standard. M.G.L. c. 209A empowers police officers to make arrests when an officer reasonably believes that a domestic assault and battery has taken place. This, however, is a disputed material fact. Probable cause cannot be categorically said to exist. Accordingly, this is an issue for trial and is not an issue for summary judgment.

Fifth, even though the defendants' motion never explicitly addressed the Plaintiff's claim of malicious prosecution beyond the section heading,[25] the Plaintiff will address this claim. Defendant Neal's arrest of Mr. Costerus on firearms possession charges was wholly unfounded. While waiting in the police station lobby, Mr. Costerus asked Defendant Holman for information on the new gun law.[26] Later, while seated at the squad room table, Mr. Costerus told Defendant Neal that he had a Massachusetts Firearms Identification Card (hereinafter an "FID" card), although admittedly, he was unsure of its then-present status as the statute had changed.[27]

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25 Defendants' Memorandum in Support of Motion for Summary Judgment, p. 8.

26 Deposition of Peter Holman, p. 9, lines 11-21.

27 Under the provisions of Chapter 180 of the Acts of 1998, Mr. Costerus' FID card was not set to expire by operation of statute until the anniversary of his birth in April, 2000. The Concord Defendants were wrong about the statute; *see* Deposition of Defendant John Kennedy, p. 15, line 5 through p. 16, line 9.

Nonetheless, Mr. Costerus possessed a validly existing FID card that made the possession of his firearms in his home entirely lawful. As a result, there can be absolutely no legal justification for arresting Mr. Costerus on these charges. Probable cause can only exist when the arresting officer has a reasonable belief that a crime was committed. The fact that none of the Concord Defendants – ever – checked the Criminal Justice Information System of the Criminal History Systems Board underscores the defendants' profound disdain for investigating the truth about Mr. Costerus' lawful possession for firearms. The arrest was without probable cause, the ensuing criminal prosecution was instituted with the knowledge of Mr. Costerus' permit – coupled with the means to verify the permit, and later failing to convey the exculpatory information to the District Attorney's Office, all point to the fact that the Concord Defendants acted with malice.

Finally, the Plaintiff does not allege Fourth Amendment or Massachusetts Civil Rights Act violations premised on false arrest or malicious prosecution. These charges stand on their own.[28] In light of the foregoing, the defendants' motion for summary judgment on Count XXV for false arrest and Count XVII for malicious prosecution should be denied. Moreover, Plaintiff's motion for summary judgment should be granted these counts.

b) Individual Defendants Are Not Entitled to Qualified Immunity

The Concord Defendants argue that

> Qualified immunity protects government officials . . . who wield discretionary powers "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known". *Harlow v. Fitgerald*, 457 U.S. 800, 818 (1982).

They further argue that even if the defendants did violate constitutional rights, the defendants enjoy qualified immunity from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard.

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[28] See Amended Complaint, Count XXV, p. 72, and Count XXVII, p. 76.

As previously stated, there was no probable cause to arrest Mr. Costerus on illegal possession of firearms charges. The defendants' actions went well beyond "mistaken" judgments. Furthermore, exigent circumstances were absent. Thus, all of the cases cited by the Concord Defendants in support of their argument are, in actuality, supportive of the Plaintiff's opposition to the defendants' motion and his motion for summary judgment.

The defendants also argue that even if the Court determines that the search and removal of Mr. Costerus' firearms to be unlawful, Defendants Neal and Landers would still be entitled to qualified immunity because a reasonable officer, given the circumstances, would have believed the search to be lawful in light of clearly established law. Perhaps an examination of the applicable domestic relations statutes is in order.

Massachusetts General Laws, Chapter 209A. Section 3B states that:

> Upon issuance of a temporary or emergency order under section four or five of this chapter, the **court** shall, **if the plaintiff demonstrates a substantial likelihood of immediate danger** of abuse, order the immediate suspension and surrender of any license to carry firearms and or firearms identification card which the defendant may hold and order the defendant to surrender all firearms, rifles, shotguns, machine guns and ammunition which he then controls, owns or possesses in accordance with the provisions of this chapter and any license to carry firearms or firearms identification cards which the defendant may hold shall be surrendered to the appropriate law enforcement officials in accordance with the provisions of this chapter and, said law enforcement official may store, transfer or otherwise dispose of any such weapon in accordance with the provisions of section 129D of chapter 140; provided however, that nothing herein shall authorize the transfer of any weapons surrendered by the defendant to anyone other than a licensed dealer. **Notice of such suspension and ordered surrender shall be appended to the copy of abuse prevention order served on the defendant pursuant to section seven.** Law enforcement officials, **upon the service of said**

> **orders**, shall immediately take possession of all firearms, rifles, shotguns, machine guns, ammunition, any license to carry firearms and any firearms identification cards in the control, ownership, or possession of said defendant. Any violation of such orders shall be punishable by a fine of not more than five thousand dollars, or by imprisonment for not more than two and one-half years in a house of correction, or by both such fine and imprisonment. M.G.L. c. 209A, §3B [emphasis added].

It is interesting to note that nowhere in statutes, and specifically, nowhere in the very statute on which the Concord Defendants steadfastly rely, are the police officers provided with one iota of police powers such that they can invade a private residence on the premise that established exigency. To the contrary, the statute at issue proscribes precisely the opposite: that only upon the issuance by the court of order pursuant to M.G.L. c. 209A, §§ 4 or 5 can the police obtain an order requiring the surrender of any firearms. In any event, nothing contained in M.G.L. c. 209A, § 3B indicates that the Concord Defendants had the right to conduct an warrantless search and seizure. Even assuming, *arguendo*, that a Court had issued a §3B protective order, the Concord Defendants could only conduct a search and seizure pursuant to the court's written order and then, only after service upon the defendant of the court order. The Concord Defendants were armed with none of the statutory prerequisites.

Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[29, 30] While the Plaintiff respectfully submits that the Concord Defendants fall into the "plainly incompetent" category, the defendants nonetheless have the burden of pleading and proving qualified immunity.[31] They have failed to do so here.

When resolving issues of qualified immunity, a court must first determine whether the

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29 *Malley v. Briggs,* 475 U.S. 335, 341 (1986).

30 *Hunter v. Bryant,* 116 L.Ed.2d 589 (1981).

31 *Harlow v. Fitzgerald,* 457 U.S. 800, 815 (1982).

plaintiff has alleged a deprivation of a constitutional right.[32] Here, the Plaintiff has alleged that the Concord Defendants violated his Constitutional protections as guaranteed by the Fourth Amendment[33] and violated his rights as guaranteed by Article XIV of the Massachusetts Declaration of Rights.[34]

Only after satisfying the above inquiry should the court then ask whether the right allegedly implicated was clearly established at the time of the events in question.[35] To be clearly established, the contours of the right of which the plaintiff was allegedly deprived must be sufficiently clear such that a reasonable official would understand that what he is doing violates that right.[36] Whereas the conducting of searches and seizures is so fundamentally basic police training, there can be no issue that the Plaintiff's protections against unreasonable searches and seizures was clearly established (for more than 200 years).

If in light of pre-existing law, the unlawfulness of the official's action is apparent, the official is not entitled to qualified immunity.[37] Objective reasonableness is measured by the amount of knowledge available to the official at the time of the alleged violation.[38]

Under the best possible light in favor of the defendants, using the *Harlow*[39] standard, the Concord Defendants' conduct violated clearly established statutory and constitutional rights of which a reasonable person – especially a trained and experienced supervisory police officer, knew or should have known. As such, the individual defendants are not entitled to qualified

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32 *Torres v. McLaughlin,* 163 F.3d 169, 172 (3d Cir. 1998) (citations omitted).

33 Amended Complaint, Count I, pp. 23-27, ¶¶ 83-111.

34 Amended Complaint, Count II, pp. 27-30, ¶¶ 112-124.

35 *Torres v. McLaughlin,* 163 F.3d 169, 172 (3d Cir. 1998) (citations omitted).

36 *Karnes v. Skrutski,* 62 F.3d 485, 492 (3d Cir. 1995).

37 *Anderson v. Creighton,* 493 U.S. 635, 649 (1987).

38 *Id.*

39 *Harlow v. Fitzgerald,* 457 U.S. 800 (1982).

immunity and their motion for summary judgment should be denied. Moreover, Plaintiff is entitled to summary judgment as a matter of law as the question of qualified immunity involves no genuine issues of material fact.

C. Due Process Claims
(Count VI)

The Concord Defendants argued in their motion for summary judgment that the Plaintiff is attempting to repackage a previously dismissed claim, amounting to nothing more than a collateral attack on Defendant Wetherbee's denial of the plaintiff's application for a license to carry. Sadly, the defendants are both wrong and, more importantly, missed the point.

First, it should be noted as a matter of record, that Count VI was not dismissed *in toto* via the Court's ruling on the defendants' motion to dismiss. The Count was only dismissed insofar as the Count makes claims against the Defendant Town of Concord.[40]

Second, Count VI of the Plaintiff's Amended Complaint alleges violations of due process whereby the defendants deprived the plaintiff of his property without prior notice, without any proceedings in a court of law, and without a search warrant or a court order pursuant to M.G.L. c. 209A, § 3B. This is the factual genesis of the due process allegations that the defendants failed to address in their motion. The Concord Defendants deprived Mr. Costerus of his property without any process, much less the process that was constitutionally due to him.

Third, the Concord Defendants assert that the existence of state remedies is relevant; however, the existence of any state remedy would apply only insofar as this Count VI addresses Defendant Wetherbee's denial of the Plaintiff's application for a license to carry. A careful re-reading of this Count shows that there is no mention of Defendant Wetherbee by name nor does this Count alleged violations of due process stemming from Defendant Wetherbee's denial of

40 See Memorandum and Order, Docket Entry 63, p. 1, ¶ 4, November 27, 2001, Lasker, J.

the Plaintiff's application. The Concord Defendants' motion should be denied as their motion is precedently inaccurate, does not address the factual basis for the Count, and whatever discussion is proffered by the defendants, is irrelevant as it relates to this Count. The motion should be denied.

Even assuming *arguendo,* that the Concord Defendants can show that an unrelated substantive due process existed, the fact remains that the Concord Defendants effected a procedural due process violation as Mr. Costerus was without any procedural remedy.

As for the Plaintiff's own Motion for Summary Judgment, there is no state process by which the Plaintiff could have sought redress short of this proceeding. The search of his home was illegal, the confiscation of his lawfully-possessed firearms was unlawful, and the deprivation of his property was without any hearing to effect redress. The Plaintiff has a protected substantive due process liberty interest in his property giving rise to his federal civil rights claim. Further, the defendants' actions in the form of a warrantless search and illegal seizure constitutes state conduct that shocks the conscience for the purposes of sustaining his federal civil rights claim.[41] This Court should grant Plaintiff's motion for summary judgment as to the remaining defendants in Counts XV and XVI.

D. Privacy Act Claims
Counts XV, XVI, XVII, XVIII, and XIX

The Concord Defendants mistakenly argue that they are exempt from the Privacy Act citing *Sutton v. Providence St. Joseph Medical Center,* 192 F.3d 826 (9th Cir. 1999) with their footnote stating that "[T]his cases raises the question whether or not the plaintiff could maintain a claim under the Privacy Act against the [Defendant] Town of Concord and individual

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41 See *McKinney v. Pate,* 20 F.3d 1550 (11th Cir.1994) (en banc), *cert. denied,* ___ U.S. ___, 115 S.Ct. 898, 103 L.Ed.2d 783 (1995).

[Concord D]efendants as the Town is not a federal agency.[42] A more comprehensive review of applicable law is warranted.

The defendants are correct insofar as the Privacy Act applies to federal agencies.[43] Similarly, private entities are not subject to the Act.[44] Note also that federal entities outside of

42 Defendants' Memorandum in Support of Motion for Summary Judgment, p. 19, fn. 7.

43 See *Ortez v. Washington County, Or.*, 88 F.3d 804, 811 (9th Cir. 1996); *Brown v. Kelly*, No. 93-5222, slip op. at 1 (D.C. Cir. Jan. 27, 1994) (*per curiam*); *Monk v. Teeter*, No. 89-16333, slip op. at 4 (9th Cir. Jan. 8, 1991); *Davidson v. Georgia*, 622 F.2d 895, 896 (5th Cir. 1980); *Ferguson v. Alabama Criminal Justice Info. Ctr.*, 962 F. Supp. 1446, 1446-47 (M.D. Ala. 1997); *Williams v. District of Columbia*, No. 95CV0936, 1996 WL 422328, at **2-3 (D.D.C. July 19, 1996); *Martinson v. Violent Drug Traffickers Project*, No. 95-2161, 1996 WL 411590, at **1-2 (D.D.C. July 11, 1996), *summary affirmance granted*, No. 96-5262 (D.C. Cir. Sept. 22, 1997); *Mamarella v. County of Westchester*, 898 F. Supp. 236, 237-38 (S.D.N.Y. 1995); *Reno v. United States*, No. 4:94CV243, 1995 U.S. Dist. LEXIS 12834, at *6 (W.D.N.C. Aug. 14, 1995) (state national guard); *Connolly v. Beckett*, 863 F. Supp. 1379, 1383-84 (D. Colo. 1994); *MR by RR v. Lincolnwood Bd. of Educ., Dist. 74*, 843 F. Supp. 1236, 1239-40 (N.D. Ill. 1994), *aff'd sub nom.; Rheinstrom v. Lincolnwood Bd. of Educ., Dist. 74*, No. 94-1357, 1995 U.S. App. LEXIS 10781 (7th Cir. May 10, 1995); *Malewich v. United States Postal Serv.*, No. 91-4871, slip op. at 19 (D.N.J. Apr. 8, 1993), *aff'd*, 27 F.3d 557 (3d Cir. 1994) (unpublished table decision); *Shields v. Shetler*, 682 F. Supp. 1172, 1176 (D. Colo. 1988); *Ryans v. New Jersey Comm'n*, 542 F. Supp. 841, 852 (D.N.J. 1982), nor does federal funding or regulation convert such entities into covered agencies, see *St. Michaels Convalescent Hosp. v. California*, 643 F.2d 1369, 1373 (9th Cir. 1981); *Adelman v. Discover Card Servs.*, 915 F. Supp. 1163, 1166 (D. Utah 1996).

44 See *Mitchell v. G.E. American Spacenet*, No. 96-2624, 1997 WL 226369, at *1 (4th Cir. May 7, 1997); *Gilbreath v. Guadalupe Hosp. Found.*, 5 F.3d 785, 791 (5th Cir. 1993); *Davis v. Boston Edison Co.*, No. 83-1114-2 (D. Mass. Jan. 21, 1985); *Friedlander v. United States Postal Serv.*, No. 84-773, slip op. at 5-6 (D.D.C. Oct. 16, 1984); *Marshall v. Park Place Hosp.*, 3 Gov't Disclosure Serv. (P-H) ¶¶ 83,088, at 83,057 (D.D.C. Feb. 25, 1983); see also *Bybee v. Pirtle*, No. 96-5077, 1996 WL 596458, at *1 (6th Cir. Oct. 16, 1996) (appellant did not state claim under Privacy Act because Act does not apply to conduct of individuals who refused to hire him due to his failure to furnish his social security number or fill out W-4 forms for income tax purposes); *Steadman v. Rocky Mountain News*, No. 95-1102, 1995 U.S. App. LEXIS 34986, at *4 (10th Cir. Dec. 11, 1995) (Privacy Act claims "cannot be brought against defendant because defendant is not a governmental entity"); *United States v. Mercado*, No. 94-3976, 1995 U.S. App. LEXIS 2054, at **3-4 (6th Cir. Jan. 31, 1995) (appellant's retained defense counsel not an "agency"), nor does federal funding or regulation render such entities subject to the Act, see *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1448 (9th Cir. 1985); *United States v. Haynes*, 620 F. Supp. 474, 478-79 (M.D. Tenn. 1985); *Dennie v. University of Pittsburgh Sch. of Med.*, 589 F. Supp. 348, 351-52 (D.V.I. 1984), *aff'd*, 770 F.2d 1068 (3d Cir. 1985) (unpublished table decision); see also *United States v. Miller*, 643 F.2d 713, 715 n.1 (10th Cir. 1981) (finding that definition of "agency" does not encompass national banks); *Boggs v. Southeastern Tidewater Opportunity Project*, No. 2:96cv196, 1996 U.S. Dist. LEXIS 6977, at **5-9 (E.D. Va. May 22, 1996) (rejecting plaintiff's argument concerning entity's acceptance of federal funds and stating that "[i]t is well settled that the Administrative Procedures [sic] Act, 5 U.S.C. §§ 551 . . . applies only to Federal agencies").

the executive branch, such as a grand jury,[45] a probation office,[46] or a federal bankruptcy court,[47] are not subject to the Act.

A notable exception to this federal agency rule is the social security number usage restrictions, contained in Section 7 of the Privacy Act, which do apply to federal, state, and local government agencies.[48] Section 7 of the Privacy Act provides, in pertinent part, that:

> It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number. Sec. 7 (a)(1).

The defendants argue that "Plaintiff's claim that defendants violated 7(a)(1) succeeds only if his arrest and booking does not constitute a required disclosure of his SSN."[49] The question is not whether the disclosure of one's social security number is required; the question in these Counts is whether the Defendant Town of Concord was required to inform Mr. Costerus whether the disclosure of his social security number was "mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.[50]

The defendants also argue that "[a]t the very least, it was not clearly established at the time of his arrest that mandatory disclosure of the plaintiff's social security number would be a violation of the Privacy Act."[51] Again, a careful review of the facts of the case refute the Concord Defendants' argument.

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45 See *Standley v. Department of Justice,* 835 F.2d 216, 218 (9th Cir. 1987).

46 See *Schwartz v. United States Dep't of Justice*, No. 95-6423, 1996 WL 335757, at *1 (2d Cir. June 6, 1996), *aff'g* No. 94 CIV. 7476, 1995 WL 675462, at *7 (S.D.N.Y. Nov. 14, 1995); Callwood v. Department of Probation of the V.I., 982 F. Supp. 341, 343 (D.V.I. 1997); *Chambers v. Division of Probation*, No. 87-0163, slip op. at 2 (D.D.C. Apr. 8, 1987).

47 See *In re Adair*, 212 B.R. 171, 173 (Bankr. N.D. Ga. 1997).

48 Section 7, originally part of the Privacy Act, Pub. L. No. 93-579, was not codified; it can be found at 5 U.S.C. §§ 552a note (Disclosure of Social Security Number).

49 Defendants' Memoradum in Support of Motion for Summary Judgment, p. 18.

50 Privacy Act of 1974, 5 U.S.C. § 552a, Note § 7 (b).

51 Defendants' Memoradum in Support of Motion for Summary Judgment, p. 21.

First, the Plaintiff has a longstanding tradition of asserting his privacy rights under the Privacy Act. At virtually every instance in which his social security number is requested, Plaintiff asserts his privilege under the Act when the requestor is neither his employer from whom he earns wages, a financial institution at which he earns interest, or the IRS. When Defendant Neal requested Plaintiff's social security number, Plaintiff cited the Privacy Act of 1974 by name.[52] Indeed, Defendant Neal coerced Plaintiff to disclose his social security number by telling him that if he did not disclose his social security number, that he "would never get out of here."[53] This is precisely the type of denial of any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number that Section 7(a) sought to prevent.

A Privacy Act lawsuit is properly filed against an "agency" only, not against an individual, a government official, or an employee.[54, 55] In this narrow regard, Plaintiff does not oppose the Concord Defendants' motion for summary judgment as to Count XV as this Count

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52 See Amended Complaint, p. 16, ¶¶ 47-48; and Deposition of Barry Neal, p. 44, line 19 through p. 47, line 11.

53 See Amended Complaint, p. 16, ¶ 49; and Deposition of Barry Neal, p. 45, lines 15-20.

54 See, e.g., *Connelly v. Comptroller of the Currency*, 876 F.2d 1209, 1215 (5th Cir. 1989); -83 (5th Cir. 1987); *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1340 (9th Cir. 1987); *Hewitt v. Grabicki*, 794 F.2d 1373, 1377 & n.2 (9th Cir. 1986); *Unt*, 765 F.2d at 1447; *Brown-Bey v. United States*, 720 F.2d 467, 469 (7th Cir. 1983); *Windsor v. The Tennessean*, 719 F.2d 155, 159-60 (6th Cir. 1983); *Bruce v. United States*, 621 F.2d 914, 916 n.2 (8th Cir. 1980); *Parks v. IRS*, 618 F.2d 677, 684 (10th Cir. 1980); *Armstrong v. United States Bureau of Prisons*, 976 F. Supp. 17, 23 (D.D.C. 1997) (appeal pending); *Claasen v. Brown*, No. 94-1018, 1996 WL 79490, at **3-4 (D.D.C. Feb. 16, 1996); *Lloyd v. Coady*, No. 94-5842, 1995 U.S. Dist. LEXIS 2490, at **3-4 (E.D. Pa. Feb. 28, 1995), *upon consideration of amended complaint*, 1995 U.S. Dist. LEXIS 6258, at *3 n.2 (E.D. Pa. May 9, 1995); *Hill v. Blevins*, No. 3-CV-92-0859, slip op. at 4-5 (M.D. Pa. Apr. 12, 1993), *aff'd*, 19 F.3d 643 (3d Cir. 1994) (unpublished table decision); *Malewich*, No. 91-4871, slip op. at 19 (D.N.J. Apr. 8, 1993); *Sheptin v. United States Dep't of Justice*, No. 91-2806, slip op. at 5-6 (D.D.C. Apr. 30, 1992); *Williams v. McCausland*, 791 F. Supp. 992, 1000 (S.D.N.Y. 1992); *Mittleman v. United States Treasury*, 773 F. Supp. 442, 450 (D.D.C. 1991); *Stephens v. TVA*, 754 F. Supp. 579, 580 n.1 (E.D. Tenn. 1990); *B.J.R.L. v. Utah*, 655 F. Supp. 692, 696-97 (D. Utah 1987); *Dennie*, 589 F. Supp. at 351-53; *Gonzalez v. Leonard*, 497 F. Supp. 1058, 1075-76 (D. Conn. 1980).

55 Note, however, that a prosecution enforcing the Privacy Act's criminal penalties provision, 5 U.S.C. §§ 552a(i) (see "Criminal Penalties" discussion below), would of course properly be filed against an individual. See *Stone v. Defense Investigative Serv.*, 816 F. Supp. 782, 785 (D.D.C. 1993) ("Under the Privacy Act, this Court has jurisdiction over individually named defendants only for unauthorized disclosure in violation of 5 U.S.C. §§ 552a(i)."); see also *Hampton v. FBI*, No. 93-0816, slip op. at 8, 10-11 (D.D.C. June 30, 1995) (citing *Stone*).

makes claims against the individual defendants, Defendants Neal, Landers, and Holman only. Defendant Town of Concord remains.

Similarly, Plaintiff also does not oppose Concord Defendants' motion for summary Judgment regarding Count XVI as against the individual defendants, Defendants Neal, Landers, and Holman only. However, some courts have held that the head of an agency, if sued in his or her official capacity, can be a proper party-defendant.[56] Defendant Wetherbee, as the head of the agency,[57] and Defendant Town of Concord[58] remain.

Assuming that causation is proven, "actual damages" sustained by the individual as a result of the failure – or $1,000, whichever is greater – are recoverable.[59] Assuming that a Privacy Act plaintiff can show: (1) a violation; (2) an adverse effect; (3) causation; and (4) intentional or willful agency conduct, then "actual damages sustained by the [plaintiff are recoverable] but in no case shall a person [who is] entitled to recovery receive less than the sum of $1,000."[60]

The defendants' assertion that "plaintiff will be unable to show that he has suffered actual damages by disclosing his social security number"[61] is not ripe for a summary judgment motion. The issue of what kinds of damages are recoverable has engendered some confusing case law. The OMB Guidelines state that "[a]ctual damages or $1,000, whichever is greater," are/is recoverable.[62] Consistent with OMB's guidance, several courts have held that the statutory

56 See, e.g., *Hampton*, No. 93-0816, slip op. at 8, 10-11 (D.D.C. June 30, 1995); *Jarrell v. Tisch*, 656 F. Supp. 237, 238 (D.D.C. 1987); *Diamond v. FBI*, 532 F. Supp. 216, 219-20 (S.D.N.Y. 1981), *aff'd*, 707 F.2d 75 (2d Cir. 1983); *Nemetz v. Department of the Treasury*, 446 F. Supp. 102, 106 (N.D. Ill. 1978); *Rowe v. Tennessee*, 431 F. Supp. 1257, 1264 (M.D. Tenn. 1977), *vacated on other grounds*, 609 F.2d 259 (6th Cir. 1979).

57 The Town of Concord Police Department.

58 The Police Department is a department of the Town of Concord.

59 See 5 U.S.C. §§ 552a(g)(4)(A).

60 5 U.S.C. §§ 552a(g)(4)(A).

61 Defendants' Memorandum in Support of Motion for Summary Judgment, p. 21.

62 OMB Guidelines, 40 Fed. Reg. 28,948, 28,970 (1975) (emphasis added).

minimum damages amount of $1,000 is recoverable for "proven injuries" – even in the absence of out-of-pocket expenses (pecuniary loss).[63] Two courts have seemed to take this even further by seemingly not requiring "proven injuries."[64]

The Concord Defendants' motion for summary judgment on Counts XV and XVI for violations of the Privacy Act should be denied as the Privacy Act is applicable to the local government in the instant matter, the Concord Defendants attempted to deny Plaintiff of a right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number; and Plaintiff is entitled to recover damages. The other counts are brought against Defendant Neal and Defendant Town of Concord arising out of Defendant Neal's negligence (Count XVII against Defendant Town of Concord), gross negligence (Count XVIII against Defendant Neal), and fraud (Count XIX against Defendant Neal). The defendants did not discuss either of these counts within the context of the Privacy Act except in their section heading[65], but do so later under the State Tort Claims heading, in the Negligence and Fraud sections. Plaintiff will address these *seriatim* later under the appropriate heading.

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63 See *Fitzpatrick v. IRS*, 665 F.2d 327-31 (11th Cir. 1982); *Leverette v. Federal Law Enforcement Training Ctr.*, No. CV 280-136, slip op. at 2-5 (S.D. Ga. July 6, 1982).

64 See *Wilborn*, 49 F.3d at 603 (no need to remand to district court for determination of amount of damages because Wilborn had limited damages sought to statutory minimum of $1,000 (citing *Fitzpatrick*)); Romero-*Vargas*, 907 F. Supp. at 1134 (stating that "emotional distress caused by the fact that the plaintiff's privacy has been violated is itself an adverse effect, and . . . statutory damages can be awarded without an independent showing of adverse effects"), *motion to alter or amend denied, id.* at 1135 (although defendant argued that court had made an error of law in awarding plaintiffs statutory damages in absence of specific findings of mental distress, finding that plaintiffs did present adequate evidence that they were adversely affected by disclosures); cf. *Fitzpatrick*, 665 F.2d at 330 (although confronted with a case in which appellant had "proved . . . that he suffered a general mental injury," stating that "$1,000 damage floor" was added as additional element of recovery "[t]o avoid a situation in which persons suffering injury had no provable damages and hence no incentive to sue"); *Porter*, No. CV595-30, slip op. at 15, 25 (S.D. Ga. July 24, 1997) (finding that because plaintiff had proven intentional and willful violation of his Privacy Act rights, he was entitled to recover statutory minimum of $1,000 even though he had suffered no pecuniary loss and court did not discuss any nonpecuniary loss).

65 Defendants' Memorandum in Support of Motion for Summary Judgment, p. 17.

E. State Tort Claims

1. Malicious Prosecution
(Count XXVII)

The Concord Defendants discuss the six standards on which the Plaintiff must prove in order to prevail on a malicious prosecution claim.[66] The Plaintiff can and will prove all six measures as the supporting evidence is incontrovertible.

The defendants also discuss the conviction of a civil plaintiff, later reversed on appeal, as establishing the existence of probable cause.[67] In the present matter, the Plaintiff was never convicted of any of the charges that the Concord Defendants brought against him. Thus, while the cases cited by the defendants are distinguishable from the facts in this matter, they are also irrelevant.

The Middlesex District Attorney abandoned the prosecution of Mr. Costerus by *nolle prosequi*, but not on the basis of a procedural or technical defect, but on the sufficiency of evidence. Thus, the criminal prosecution of Mr. Costerus terminated in his favor.[68]

The defendants hypothetically argue that *if* the Plaintiff asserts a Federal claim for malicious prosecution, it is not cognizable under Section 1983. While the defendants are theoretically correct, the theory has no relevance here as Plaintiff makes no claim under Section 1983 for malicious prosecution; therefore, the argument is moot. Plaintiff objects to the defendants' attempt to link the malicious prosecution claim, and opposes their motion for summary judgment as Counts I and VI make no reference to a malicious prosecution, and conversely, Count XXVII makes no reference to Section 1983. Accordingly, the Concord Defendants' motion should be denied. Furthermore, as there are no genuine issues of material

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66 Defendants' Memorandum in Support of Motion for Summary Judgment, p. 21 and cases cited therein.

67 Defendants' Memorandum in Support of Motion for Summary Judgment, p. 22 and cases cited therein.

68 See *Wynn v. Rosen*, 391 Mass. 797, 800, 801 (1984).

fact barring the Court's entry for summary judgment in Plaintiff's favor, this Court should so grant on Count XXVII.

2. False Imprisonment and False Arrest
(Counts XXV and XXVI)

The question of the existence of probable cause for the Concord Defendants to arrest Mr. Costerus is a question of fact. As such, the defendants have prematurely moved for summary judgment as it relates to Counts XXV (False Arrest) and XXVI (False Imprisonment). The Plaintiff argues that there was no probable cause to arrest Mr. Costerus for domestic assault and battery as no such assault and battery occurred. And even if, *arguendo*, the Concord Defendants investigated such activity, such detention and arrest were unreasonable in light of the specific circumstances. Furthermore, there can be no justification for the Concord Defendants' arrest and imprisonment of Mr. Costerus on the illegal possession of firearms charges. Where there is a genuine issue surrounding this material fact, the defendants' motion should be denied as this is an issue for trial.

Here, again, the defendants attempt to link the false imprisonment and false arrest claims, and opposes their motion for summary judgment as Counts I and II make no reference to a malicious prosecution, and similarly, Counts XXV and XXVI make no reference to a Fourth Amendment claim (or its state-equivalent, Art. XIV of the Declaration of Rights). The defendants' reliance on *Earle v. Benoit*[69] is irrelevant and inapplicable to the instant matter. Accordingly, the Concord Defendants' motion should be denied.

3. Abuse of Process
(Count XXVIII)

As is very carefully set forth in the Amended Complaint, the Concord Defendants

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69 *Earle v. Benoit*, 850 F.2d 836 (1st Cir. 1988).

conducted an unwarranted search of the Plaintiff's home, unlawfully seized and confiscated his personal property while Plaintiff possessed a valid Massachusetts FID card, knew that Plaintiff held such FID card, had the means and availability to verify the validity of said FID card, lacked probable cause, arrested and imprisoned Plaintiff, instituted criminal proceedings against Plaintiff, had further exculpatory information surrounding his FID card, failed to convey the exculpatory information to the prosecutor, and their failed attempt to use the fruit of the poisonous tree to justify the prior illegal search and seizure all point to a concerted effort to maliciously abuse the legal process. Quoting the defendants standard, the "(1) process was used; (2) for an ulterior or illegitimate purpose; (3) resulting in damage."[70] The defendants' motion for summary judgment is prematurely moved as the issue of probable cause is one for trial and not for a summary judgment motion.

4. Negligence Claims
(Counts XVII, XVIII, XXI, and XXIII)

The defendants argue that before any claim for negligence under the Massachusetts Tort Claims Act (hereinafter the "MTCA"), M.G.L. c. 258, § 4 requires that a claimant must first present his claim in writing before instituting a civil action. Fortunately, Plaintiff properly presented his claim to the Town Clerk and to the Chair of the Board of Selectmen of the Town of Concord. There was no response from the Town. Accordingly, the defendants' attempted §4 escape from liability is transparent. The defendants' assertion that "the plaintiff never sent a presentment letter to any executive officer for the Town of Concord . . . [and] has failed to make proper presentment of his claim" is factually wrong, patently misleading to the Court, and underscores the deceptive tactics employed to avoid liability. In addition to giving adequate

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70 Defendants' Memorandum in Support of Motion for Summary Judgment, p. 24, citing *Guiteirrez v. MBTA*, 437 Mass. 396 (2002); *Datacomm Interface, Inc. v. Computerworld, Inc.* 396 Mass. 760, 775-776 (1986); and *Bednarz v. Bednarz*, 27 Mass.App.Ct. 668 (1989).

grounds for denying the defendants' motion for summary judgment, the defendants provide no other basis for refuting the claim of negligence. In fact, in a previous pleading, "The Concord Defendants recognize the appropriately pled cause of action against Defendant Town of Concord."[71] Accordingly, with unanimity among the parties, the Court should deny the defendants' motion for summary judgment. Plaintiff further moves for entry of summary judgment in his favor as to all claims of negligence in Counts XVII, XVIII, XXI, and XXIII.

The defendant's argue in a footnote[72] that Count XVIII, as a claim of gross negligence concerning the Privacy Act of 1974, should be dismissed by virtue of the M.G.L. c. 258, § 2 barring actions against public employees. Count XVIII (Defendant Neal Grossly Negligent about Privacy Act of 1974) alleges that Defendant Neal recklessly acted with deliberate indifference and intentionally used misinformation and false pretense to wilfully threaten, intimidate, or coerce Costerus to disclose his social security number, in violation of 5 U.S.C. 552a § 7 (a)(1). The MTCA does not provide a blanket umbrella for all actions committed within the scope of their public employment. As a result of his committing this intentional tort, Defendant Neal is not protected by the Massachusetts Tort Claims Act as M.G.L. c. 258, § 10 specifically excludes actors who act intentionally, with deliberate indifference, or who fail to exercise or perform a discretionary function or duty. Accordingly, Count XVIII is properly brought against Defendant Neal (see Amended Complaint, p. 59, ¶ 283) who should be held individually liable. Accordingly, this Count XVIII should not be dismissed.

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71 Concord Defendants' Motion to Dismiss Certain Counts of Plaintiff's Amended Complaint Motion, fn. 13, p. 18; Amended Complaint, ¶ 272, p. 56.

72 Defendants' Memorandum in Support of Motion for Summary Judgment, p. 25, fn. 10.

5. Fraud
(Count XIX)

The definition of fraud, a noun, is "a misleading falsehood."[73] Webster's 1913 Dictionary adds a note that "in popular use, this word often conveys the idea of intentional untruth."[74] The Concord Defendants argue in their Memorandum the elements for fraud. Indeed, Plaintiff describes each of these elements in the Amended Complaint in Count XIX.

When Defendant Neal requested Plaintiff's social security number, Plaintiff cited the Privacy Act of 1974 by name.[75] Indeed, Defendant Neal coerced Plaintiff to disclose his social security number by telling him that if he did not disclose his social security number, that he "would never get out of here."[76] Defendant Neal acknowledged and admitted that he cited the Supreme Court in an attempt to have Mr. Costerus to divulge his social security number.[77] This fact is not in dispute. There is no doubt as to the misrepresentation. There is no doubt that Mr. Costerus relied on the misrepresentation and divulged his social security number under duress. The only question of fact for trial is whether Defendant Neal intentionally misrepresented the truth to coerce or induce Mr. Costerus to reveal his social security number. The Concord Defendants' are not entitled to an entry of summary judgment as a matter of law as it relates to Count XIX for fraud against Defendant Neal should as there is a genuine issue of a material fact for trial. Their motion for summary judgment should therefore be denied.

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73 WordNet Dictionary, http://www.hyperdictionary.com/dictionary/misrepresentation.

74 Webster's 1913 Dictionary, http://www.hyperdictionary.com/dictionary/misrepresentation.

75 See Amended Complaint, p. 16, ¶¶ 47-48; and Deposition of Barry Neal, p. 44, line 19 through p. 47, line 11.

76 See Amended Complaint, p. 16, ¶ 49; and Deposition of Barry Neal, p. 45, lines 15-20.

77 Deposition of Barry Neal, p. 45, line11 through p. 46, line 7.

III. CONCLUSION

WHEREFORE, for all of the foregoing reasons set forth above, Plaintiff respectfully requests this Court to deny the Concord Defendants' Motion for Summary Judgment *in toto* except where noted herein as it relates to Counts XV and XVI. Plaintiff further respectfully requests this Court grant the entry for summary judgment in his favor as it relates to Counts I, II, V, VI, VII, X, XV, XVI, XVII, XVIII, XXI, XXIII, XXV, XXVII.

Respectfully submitted on October 20, 2003, by,

Plaintiff, *pro se,*

Alec S. Costerus
16577 Sweetbrush Drive
Parker, Colorado 80134-3718
☎ 303 841 5400

AFFIDAVIT OF CERTIFICATE OF SERVICE
Local Rule 5.2 (b)(1)

I, Alec S. Costerus, under pains and penalty of perjury, hereby certify that a true copy of the above document was served upon James W. Simpson, Jr., the Concord Defendants' attorney of record, with offices located at Merrick Louison & Costello, LLP, 67 Batterymarch Street in Boston, Massachusetts 02110-3206, by first class mail, on October 20, 2003.